United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE VAN ORSDEL

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DISTRICT OF COLUMBIA
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IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1934.

No. 6157.

499

JULIA B. SCOTT, *Appellant,*

vs.

ROBERT J. HOAGE, Deputy Commissioner, United States Compensation Commission, B. EARLIE TALBOTT, and ROYAL INDEMNITY COMPANY, a Corporation, *Appellees.*

BRIEF ON BEHALF OF APPELLANT.

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Release your memories com-
pany, but hold our memories
dear.

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1934.

No. 6157.

JULIA B. SCOTT, *Appellant,*

vs.

ROBERT J. HOAGE, Deputy Commissioner, United States Compensation Commission, B. EARLIE TALBOTT, and ROYAL INDEMNITY COMPANY, a Corporation, *Appellees.*

BRIEF ON BEHALF OF APPELLANT.

I.

STATEMENT OF CASE

This case arises under the provisions of the Longshoremen's & Harbor Workers' Compensation Act of March 4, 1927 (*U. S. C. A., Title 33, Ch. 18*), made applicable to employees in certain employments in the District of Columbia by the Act of May 17, 1928 (*D. C.*

Code, T. 19, Ch. 2), which will hereinafter be referred to as the Compensation Act. Page references herein are to the typewritten transcript of record.

This is an appeal by the appellant (plaintiff below), claimant wife of deceased employee, from a decree of the Supreme Court of the District of Columbia dismissing appellant's bill of complaint for a mandatory injunction against the appellee, Robert J. Hoage, as Deputy Commissioner, to set aside a compensation order in form of rejection of claim of appellant under the said Compensation Act. B. Earlie Talbott, appellee, is made a party herein as the Employer and the Royal Indemnity Company, a corporation, appellee, as the Insurance Carrier.

The appellant, Julia B. Scott, filed with the said Deputy Commissioner a claim for compensation, for herself and two children, Anual David Scott and Pearl Beatrice Scott, aged ten and three years respectively, because of the death of her husband, William McKinley Scott, in the Alzarado Apartments, 70 Rhode Island Avenue, N. W., in the District of Columbia, November 27, 1932. A hearing was had before appellee Robert J. Hoage, as Deputy Commissioner, who rejected said claim, passing an order to that effect. Appellant herein then sought a review of the Deputy Commissioner's decision in the Supreme Court of the District of Columbia in a mandatory injunction suit, as aforesaid, in accordance with the provisions of the Compensation Act, and the three defendants, appellees herein, moved to dismiss the bill. The court below, after hearing the motions to dismiss, dismissed the bill of complaint, from which action this appeal is taken.

At the hearing before the Deputy Commissioner the employer appellee presented three theories of defense:

(1) death did not arise in the course of and out of the employment (R. 123); (2) death was caused by homicide (R. 194); (3) death was caused solely by intoxication (R. 123).

In regard to the question as to whether or not deceased died in the course of and out of his employment the testimony shows in substance that the deceased was resident janitor of the Alzarado Apartments, on duty twenty-four hours a day, and was required to live on the premises by his contract of employment, in quarters furnished by his employer. (R. 105-108, incl.) The claimant saw deceased sober at 11:30 p.m. on the night of the fire in their basement apartment as she was going to bed. (R. 111.) A witness, named Nesbit, was with him from 2.30 a.m. to 3:30 a.m., the last half hour at the house of another witness, called Dollar More Bill. The latter testified to this and both said deceased had a few drinks, but that he was sober. They both testified that deceased left this place with the expressed intention of attending to the fires at his place of employment. (R. 126-128, 136, 141, 145, 154.) About 4 a.m. claimant heard the springs of her bed squeak, as if deceased was getting off the bed. She heard deceased say "Oh, whee," and turning saw a fire which threw light into the room. Deceased went out the door through the fire. She jumped out of bed, grabbed her two children and got out of the building through a window in the apartment. (R. 101-104, incl., 113, 114.) Deceased was found dead two days later in the bottom of a dumb waiter shaft in the Alarado Apartments and had on his trousers and underwear. (R. 29, 35.) He died on the premises. (R. 122, 123), from universal burns of the body. (R. 29, 31.)

In regard to homicide, there was only the opinion of Inspector Roberts, appellee employer's witness (R. 201, 202) offered to sustain the theory, which was based on an assumption of facts contrary to all the evidence in the case. (R. 187, 188.) There was conflicting testimony as to the place of origin of the fire, the only competent evidence, however, being that its origin was unknown. (R. 196.) There was testimony that deceased could have climbed into the shaft by his own efforts. (R. 43, 44, 46-52, incl., 77, 78, 81.) As against that there is the testimony of Roberts who said he did not understand how deceased got into the shaft by himself in the position he thought the body was found. (R. 187, 188.) The only eye witnesses said the buttocks of deceased touched the floor (R. 77, 43, 47, 49), while Roberts said he understood the head and shoulders were on the floor. (R. 187, 188.) There was evidence that Nesbit had a friendly scuffle with deceased (R. 131) and testimony that it concerned deceased's wife. (R. 206.) The Deputy Commissioner in his finding said there was some evidence of homicide, without making a positive finding. (R. 216.)

In regard to intoxication all the competent evidence established that deceased was not drunk at the time of his death. (R. 111, 128, 151, 152, 138, 153.) Dr. Murphy, however, gave his opinion that deceased was intoxicated. (R. 38.) The Deputy Commissioner found that deceased did not die solely from intoxication. (R. 216.)

There was also evidence in regard to the alleged cancellation of a policy of insurance. It showed that a policy of insurance, covering employees of Benjamin E. Talbott, known herein as B. Earlie Talbott, appellee, was issued by the Royal Indemnity Com-

pany, appellee, to take effect from July 1, 1932, to June 30, 1933. (R. 16.) This policy as carried on the Commission's records was No. C-598146. A letter of that company, dated July 22, 1932, received in the Commissioner's office July 23, 1932, purported to notify the Commission that a policy on Benjamin E. Talbott, No. C-569146, was cancelled. (R. 17, 18.) The records of the Commission showed coverage on policy No. C-598146 from July 1, 1932, to July 30, 1933, to Benjamin E. Talbott. (R. 23.) On this testimony the Deputy Commissioner found (R. 216):

> "that the cancellation was effective prior to the date of injury and the insurance company, therefore, is not liable for the payment of compensation;"

II.

ASSIGNMENT OF ERRORS.

The court erred:

(1) In sustaining the motion of the defendants to dismiss the plaintiff's bill of complaint filed in said cause.

(2) In entering the decree dismissing the plaintiff's Bill of Complaint.

(3) In holding that the compensation order in form of rejection of claim, in this case, was in accordance with law.

(4) In failing to order defendant Deputy Commissioner to make an award to the plaintiff and her minor children in this case.

(5) And other errors of law appearing on the face of the record.

All the assignments relate to the basic questions of appellant's right to a review on the findings as to whether or not death was within the course of and out of the employment, the liability of the insurance carrier, and the other matters in the findings.

III.

ARGUMENT.

A. The Court May, in This Case, Review the Facts to Determine Whether They Support the Finding, and Whether the Finding is in Accordance With Law.

The matter of the alleged cancellation of the policy of insurance, which will be discussed hereafter, is a question of law arising upon undisputed facts, and therefore reviewable by the court. The matter of the causal connection between the death and the employment is also a question of law arising upon undisputed facts. Therefore the court has authority to review the evidence to determine whether the death arose in the course of and out of the employment and to determine whether there was a sufficient notice of cancellation of the insurance policy in accordance with law.

Liberty Mutual Co. v. Hoage, 61 W. L. R. 565.
Fidelity Cas. Co. v. Burris, 61 App. D. C. 228.
Powell v. Hoage, 61 App. D. C. 99.
New Amsterdam Co. v. Hoage, 60 App. D. C. 40, 41.

So an Appellate Court, notwithstanding the so-called finality of the Deputy Commissioner's findings, reviews the testimony in each case to see whether or not there was any competent evidence or reasonable evi-

dence to support the finding or rejection of claim, or to determine whether the finding is unreasonable, capricious, or arbitrary.

Liberty Mutual Co. v. Hoage, 61 W. L. R. 565.
New Amsterdam Co. v. Hoage, 60 App. D. C. 40.
Georgetown Hosp. v. Stone, 61 App. D. C. 200.

The Deputy Commissioner's finding cannot be based on matters not in the record and therefore a review of the evidence is required to prevent the Deputy Commissioner making a finding not based on evidence in the record.

Crowell v. Benson, 285 U. S. 22, 47, 76 Led. 599.
New Amsterdam Co. v. Hoage, 60 App. D. C. 40, 41.

B. The Facts Show That Deceased Was Killed in the Course of and Out of his Employment.

a. *Injuries received while sleeping or staying on employer's premises in accordance with the contract of employment are compensable.*

As deceased was required by his contract to be on the premises where he was killed and, as he was killed while on the premises in accordance with the contract, death arose out of and in the course of his employment. The following statement of the evidence shows this, as does the finding.

The finding shows deceased was resident janitor at the Alzarado Apartments (R. 215), and the evidence shows he was subject to call for duty at all hours of the day and night and was required to stay on the premises as part of the contract of employment in the quarters furnished by his employer. (R. 102, 105, 106.)

A fire took place in the premises and deceased was burned to death thereon. (R. 215, 216.) Shortly before the fire, deceased expressed his intention of going to his place of employment to attend to the fires. (R. 145, 154.) He reached the place but a short time before, obviously with that intention (R. 101-104, incl., 113, 114), and still had clothes on when he was later found dead. (R. 29, 35.)

In regard to the cause of death, Julia Scott, appellant, testified as follows: Deceased had to attend to the furnace, clean halls, take down trash, garbage, etc. He would usually take down the trash in the night, and clean the halls in the morning. (R. 105.) In the wintertime he always got up and would see about the fire in the night; if he went out anywhere, he would attend the fires when he came home, and if he did not do that, he would get up during the night and see about the fires, because sometimes they would get low before next morning. (R. 105.) He always looked at the fires about 4 a. m. (R. 102.) Julia Scott and deceased were required to stay on the premises of Talbott at night by their contract of employment. (R. 106.) Employer, appellee, provided quarters for deceased, his wife and children, on the premises. (R. 107, 108.) Julia Scott helped deceased perform his duties as janitor. (R. 111.) In the wintertime the fires were always burning. (R. 106, 107.)

On the night of the death of deceased, which was the "coldest night we had had" (R. 106) Julia Scott saw deceased at 11:30 p. m. in their apartment in the cellar, just before she went to sleep. (R. 101.)

James Nesbit (appellees' witness) testified that about 2:30 a. m. the same night deceased knocked at

the door of the locker in the cellar of the Alzarado apartment in which he (Nesbit) lived, and asked him to come and get a drink. (R. 126, 127.) They walked to Dollar More Bill's place; both drank while there. Deceased was there about a half hour when he said he had to go home to attend to his fire. (R. 128, 136.) Nesbit did not go but stayed till 6 a. m. (R. 126.) They arrived at Dollar More's place about 3 a. m. (R. 129.) Mose Allen, known as Dollar More Bill (appellees' witness) corroborated Nesbit's testimony in every particular, except that according to him deceased and Nesbit arrived at his place about 1:30 to 2:30 a. m. Deceased left about 3:30 a. m. (R. 145.) Deceased said he had to go home and start up his fires (R. 145, 146), and said to Nesbit "Let's go home. I think my fires are going down and I have to go to my work." "I am going home to see about my fires." (R. 154.)

Julia Scott after falling asleep did not know any more until she heard the springs of her bed squeak. (R. 101, 113, 114.) When next morning, about the time that deceased usually got up to look at the fires, Julia Scott was awakened by a jerk of the bed springs, as if deceased was getting off the bed. She turned around in the bed and heard deceased say, "Oh, whee!" and saw a fire which threw light into the room, as he had left the door open. Deceased went out the door, through the fire. The whole basement was lighted. She jumped out of bed, exclaiming, "The house is on fire." She got her two children, got a chair in place in the back room, punched out a screen, and put her children and herself out the window. (R. 101-104, incl.) The fire alarm was given at 4:33 a. m., on the morning of November 27, 1932. (R. 28.)

Deceased was found dead two days later in the bottom of a dumb waiter shaft in the Alzarado Apartments, and had on his trousers and underwear. (R. 29, 35.) He died on the premises (R. 122, 123), from universal burns of the body. (R. 28, 31.) The finding of the Deputy Commissioner was in substance the same. (R. 215, 216.)

The Deputy Commissioner finds (R. 216):

> "* * * that the claimant failed to establish by evidence that the employee's injury and death on November 27, 1932, arose out of and occurred in the course of his employment; that there is no evidence of any causal connection between the employment and the cause of death, and from the evidence it appears that the said death may have been the result of homicide or other causes not connected with his employment."

While the above finding down to the semi-colon, if it stood alone, might be treated as a definite finding against claimant on the essential question as to whether or not death "arose out of and occurred in the course of his (deceased's) employment," when taken in connection with what follows the semi-colon, the definiteness of the finding disappears. What follows shows plainly that the mind of the Deputy Commissioner comprehends what precedes and what succeeds the semi-colon as one idea. What succeeds, however, is not a specific finding that death was due to homicide. Had there been a specific finding to that effect what precedes would be justified. The innuendo of homicide does not support what goes before it.

It might, therefore, be contended that there is no finding of fact justifying the denial of the claim. It is, however, submitted that in so far as the Deputy

Commissioner has made findings against the claimant, both as regards what precedes and what succeeds the semi-colon, there is no evidence to support his conclusions.

The aforesaid evidence shows clearly that deceased was on the premises of his employment, either sleeping, resting, or working, by virtue of his contract of employment, when he was burned to death by a fire on the premises. Detailed reference is made to just one case in which compensation was awarded in a situation of this kind. In *Gileotti v. Hoffman,* 246 N. Y. 279, and 56 A. L. R. 500, a chef in a hotel slept there by virtue of his contract of employment. The hotel burned and he was burned to death while in his room. The court held that death was compensable. The court said:

> "The relation of employer and employee did not cease because the employee was off duty * * *. The parties contemplated that Gileotti, when not engaged in work, should occupy his room because he was an employee. He was reasonably exercising his right, which his contract of employment authorized him to exercise. He did not become a boarder when he ceased to cook.
>
> "A more serious question is: Did the death arise out of his employment * * * An accident due to fire springs from a risk peculiar to the particular locality of the work. If the employee were not in the burning building he would not be within the zone of danger. It follows that his employment called him into a source of potential danger from that source.
>
> "* * * It was of little consequence whether Gileotti had his trousers on or off, or was preparing for bed or to leave the premises. He was where his employment took him at the time and he

was exposed to a risk arising out of such employment."

To the same effect are *Rucker v. Read,* 39 N. J. L. J. 48, 31 A. L. R. 1256, and *Holt Lumber Co. v. Ind. Comm.,* 168 Wis. 381, 170 N. W. 366, and numerous other cases listed in the annotations in *31 A. L. R. 1252,* and *56 A. L. R. 512,* including not only well-reasoned cases in the states of this country, but also cases in the English and Irish reports. These cases refer specifically to employees of hotels and apartment houses. (*31 A. L. R. 1256; 56 A. L. R. 513.*) The cases allowing recovery under these circumstances represent the decided weight of authority. In so far as there are cases to the contrary, the United States Supreme Court cases following indicate that the majority viewpoint should be followed. In *Cudahy Packing Co. v. Parramore,* 263 U. S. 418; 68 L. ed. 366, an employee was injured while crossing railroad tracks outside the place of employment and before his employment commenced, but while on his way to work. It was not possible for him to reach his place of employment by any other route. The court held the injury was compensable (p. 370), and said:

"He (Parramore) had no other choice than to go over the railroad tracks in order to get to his work; and he was in effect invited by his employer to do so. And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected."

This doctrine was extended in *Bountiful Brick Co. v. Giles,* 276 U. S. 154; 72 L. ed. 507, to a case where

the employee had a choice of one or more routes to his place of employment. These two cases were followed in *Voehl v. Indemnity Co.*, 288 U. S. 162; 77 L. ed. 676, in a case in which the employee was riding in his own automobile on his way to his place of employment at the time he was injured.

In *Georgetown Hospital v. Stone,* 61 App. D. C. 200, this court said the Compensation Act should be construed liberally in favor of the employee.

b. *Appellant is entitled to the benefit of the presumption that in the absence of substantial evidence to the contrary the claim comes within the provisions of the Compensation Act.*

Deceased met his death on the premises of his employer (R. 122), during his hours of employment. (R. 105, 102, 106, 107, 108.) His death was by burns (R. 28, 31), from a fire which took place on these premises. (R. 28.) The Compensation Act provides:

> "Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of the Act."

There is no substantial evidence of homicide, suicide or drunkenness causing his death, or of any other cause of his death, as will be shown hereafter. Therefore the presumption that the claim comes within the Act should apply.

Liberty Mutual Co. v. Hoage, 61 W. L. R. 565.
New Amsterdam Cas. Co. v. Hoage, 60 App. D. C. 40.

Fidelity Cas. Co. v. Burris, 61 App. D. C. 228.
Fogarty v. Nat. Biscuit Co., 221 N. Y. 20.
Driscoll v. Gillen & Sons, 226 N. Y. 568.

c. *There is no finding of homicide and no testimony upon which to base such a finding.*

The Deputy Commissioner found (R. 216) that "said death may have been the result of homicide or other causes not connected with his employment." This so-called finding is vague, and if it has any meaning at all it is to the effect that, while there is testimony tending to prove homicide, there was no homicide proved. The finding indicates that the mind of the Deputy Commissioner was blurred and that he was in doubt as to a good reason for finding that the death did not arise in the course of and out of the employment. To justify the finding, however, that the death did not arise in the course of and out of his employment the Deputy Commissioner added this gratuitous suggestion that the death may have been the result of homicide or other causes. In no place does he suggest the meaning of the phrase "other causes." So being in doubt, he gives the benefit of the doubt in his mind against the presumption that ought to obtain, which is discussed in the previous section.

The appellees abandoned the theory of homicide in their argument before the lower court, expressly stating that homicide is out of the case. However, we discuss the evidence here, in case appellees change their mind.

The origin and place of the fire was unknown (R. 196) according to the official report of the Fire Department, in which Raymond C. Roberts, fire inspector, concurred, though he gave his personal opinion that

the fire originated in the basement, close to the basement stairs, between the basement stairway and electric switchboard in that vicinity. (R. 197.) He admitted all trace of the origin of the fire was blotted out. (R. 196, 197.) According to several witnesses the deceased could have entered the shaft by his own efforts. These witnesses saw the body when it was found in the shaft. Captain Murphy, Fire Department (R. 43, 44), Private Redman, Fire Department (R. 46-52, incl.), and Ira Keppler, Fire Prevention Bureau (the latter appellees' witness). (R. 77, 78, 81.) Roberts did not see the body in the shaft. (R. 188.) In his opinion, Nesbit was responsible for the position in which he understood deceased was found. (R. 201, 202.) He understood that when the body was found in the shaft the head was on the shoulders, his face was up, and the shoulders on the floor, the body resting on the shoulders. (R. 187, 188.) The three witnesses who saw the body in the shaft testified in substance that the body was in a crouched position, buttocks were touching bottom of the basement, feet and head were up. (R. 77.) His head was as high as his feet, "sort of doubled up" (R. 47), knees doubled. (R. 49.)

Nesbit testified that he had a friendly scuffle with deceased. (R. 131.) Roberts testified that he knew from someone (never stated who) that prior to the fire Nesbit and deceased had a fight over deceased's wife. (R. 206.) Talbott testified that deceased told him the day before the fire that he had a fight with someone, but did not say who it was. (R. 164, 165.) There was no evidence of trauma or injury about the head, brain, or abdomen. (R. 35, 36.)

The theory of homicide was based solely on the testimony of Raymond C. Roberts (R. 180 *et seq.*) who

said he did not understand how the deceased got in the shaft by himself in the position in which he thought deceased was found (R. 184, 187, 188) and it was his opinion that Nesbit was responsible for the position in which he thought deceased was found. (R. 206, 208.) He thought Nesbit was responsible because of hearsay statements that Nesbit had trouble with deceased over the latter's wife. (R. 208.) His understanding without seeing the body in the shaft (R. 198) of the position in which deceased was found was incorrect because he thought the head was down on the shoulders, the face up and shoulders on the floor, body resting on the shoulders. (R. 198, 203.) The only three eye witnesses stated in effect that the body was in a crouched position, buttocks were touching the bottom of the basement, feet and head were up, and knees doubled. (R. 77, 47, 43.) Roberts' opinion testimony was therefore based on an assumption that was not true in fact. If the body was in the shaft in the position in which Roberts understood it was, there would have been some basis for his opinion, for the position understood by Roberts would have been the position of one who was dumped into the shaft by another. The only testimony of a quarrel between Nesbit and deceased was the aforesaid hearsay testimony of Roberts. At most it would only prove a motive, which is certainly insufficient of itself to connect Nesbit with any murder of deceased. There is not one bit of testimony to connect Nesbit with the murder of deceased. The only evidence shows he was not anywhere near the building at the time. (R. 126.) There was not one bit of testimony on which an opinion of homicide could be based. Opinion testimony must be based on facts proved in evidence. *Liberty Mutual Co. v. Hoage,* 61

W. L. R. 565. Without this opinion the theory of homicide falls to the ground.

Without substantial evidence to the contrary, the presumption is that death is accidental. Suicide and murder are not presumed.

Westman's Case (Me.), 106 Atl. 532.
Compensation Act, sec. 20(d).

d. *There was no proof of intoxication, either as a sole or contributing cause of death.*

The only finding the Deputy Commissioner made as to intoxication (R. 216) was that "the employer failed to establish that the death was caused solely by intoxication."

Appellees in the lower court abandoned the theory of homicide and contended that the deceased was enjoying a drunken debauch when he met his death. This contention was made in spite of the fact that the Deputy Commissioner made the foregoing finding, and made no finding that the deceased was intoxicated to any extent. So the appellees are in the inconsistent position of rejecting the Deputy Commissioner's suggestion (homicide) as to the possible cause of the death and attempting to sustain the Deputy Commissioner's finding on a theory (intoxication) not supported by the finding, as well as not supported by the evidence. Appellees are in effect rejecting the Deputy Commissioner's finding, when as appellees they are bound to rely on the finding and to request this court to sustain it.

The only testimony as to intoxication of deceased immediately preceding his death was the opinion of Dr. C. J. Murphy, who gave his opinion that deceased was

drunk and drunkenness was a contributing cause of the death. An examination of his testimony shows that the only indisputable fact on which the opinion was based was that the stomach content of the deceased at the autopsy of his body contained 9.06 per cent alcohol, a large amount. (R. 36, 38.) The opinion was based also on the statement of Dr. Murphy that by experiments and tests he knows that heat will cause alcohol to evaporate (R. 40), though he admitted he had no scientific way of estimating the amount of liberation of alcohol from the body between November 27th, the day of the fire, and November 29th, the day of the autopsy. (R. 39, 40.) His opinion was to the effect that there being an unusually large amount of alcohol in the stomach at the time of death, deceased must have been drunk, and being drunk it must have contributed to his death. The experiments and tests, however, were not in evidence and there was no evidence to show that the experiments and tests were made under circumstances similar to those prevailing at the time of the occurrence about which the doctor testified. Without such a showing the experiments and tests would not be admissible in evidence. (Note: *8 A. L. R. 18; 85 A. L. R. 479; Lake Erie R. R. Co. v. Mugg,* 132 Ind. 168, 174.) Unless the experiments were in evidence they could not be the basis of an opinion. *Liberty Mutual Co. v. Hoage, supra.* So the opinion was given without any knowledge of how much alcohol had been lost by evaporation and therefore without knowing how much alcohol was in the stomach at the time of death.

Furthermore, there was no testimony to show whether a large or small amount of alcohol was necessary to make the deceased intoxicated. The court will take judicial notice of the fact that men are af-

fected differently by similar amounts of alcohol and that some men can drink large amounts of alcohol without getting intoxicated. Without proof of one's capacity to drink, mere proof of the quantity drunk is not even prima facie proof of intoxication.

James v. State, 193 Ala. 55, 67,
Gourly v. Ky., 140 Ky. 221,
Steinkrauer v. Eckstein, 170 Wis. 487,
Tuttle v. Russell, 2 Day (Conn.) 201, 204,
Hoagland v. Canfield, 160 Fed. 146,
Lefens v. Ind. Comm., 286 Ill. 32, 121 N. E. 182,
Evens v. La., G. & F. Co., 140 So. 245.

In *James v. State, supra,* the court excluded defendant's question to the state's witness, "Had he been drinking pretty heavily for several days previous to the killing?" At the time of the question there was no testimony before the court that defendant was drunk in any degree on the day of the killing or at any other time. The court said in sustaining the lower court:

> "It is, of course, to be conceded that, when there is evidence of drunkenness, its probable degree may be illustrated by showing that it was immediately preceded by protracted and heavy drinking, yet proof of the latter fact alone does not even prima facie show that it was in fact followed by any degree of drunkenness."

In the case at bar the only persons who actually were with deceased within a short while prior to his death testified that deceased was sober, which appears from the following statement of the testimony:

> Julia Scott testified deceased had not been drinkink before she went to bed. (R. 111) Both Nesbit

and Dollar More Bill testified that deceased had only a couple of small drinks in their presence (R. 128, 151, 152) and was not drunk with them that night and did not leave Dollar More's place drunk. (R. 138, 153.) Roberts, fire inspector, did not concentrate on drinking phase because his investigation showed that deceased left Dollar More's place under his own power and was not so dead drunk that he couldn't get away. (R. 208.)

The last three witnesses are appellees' witnesses. Roberts is only testifying to hearsay, the value of which there is no way of judging. In any case, even Roberts does not testify that deceased was drunk. In so far as these witnesses are concerned, there is no competent evidence on which to base a finding of intoxication, which no doubt is the reason why the Deputy Commissioner fails to make such a finding.

Nowhere in all the record is there any competent evidence as to the manner in which or extent to which intoxication contributed to or caused the death of deceased. There is no evidence in the record upon which to base an inference or a supposition of intoxication, and Dr. Murphy's opinion is consequently a gratuitous assumption.

e. *To prevent an award of compensation the death must result solely from intoxication.*

The finding of the Deputy Commissioner "that the employer failed to establish that the death was caused solely by intoxication" settles that matter. On pages 122, 123 of the record, it appears that the appellees' contention on this matter before the Deputy Commissioner was that the injury was caused solely by intoxication. But appellees in the court below contended

that the deceased was enjoying a drunken debauch when he met his death, and that therefore he could not have been injured in the course of and out of his employment. Of course, as shown in the preceding section, it is a contention for which there is no evidence in support.

Ordinarily, drunkenness merely tends to establish negligence, which does not prevent an award of compensation (*Compensation Act, s. 5*), or the fault of the employee, which also does not prevent an award of compensation. (*Ib. s. 4(b)* .) If the injury arose in the course of and out of the employment, then intoxication must be the *sole* cause of the death to prevent an award of compensation. Mere intoxication is not sufficient. (*Ib. s. 3(b)* .)

Griffith & Sprague v. Marshall, 56 Fed. 2d 665,
American Ice Co. v. Fitzhugh, 128 Md. 382,
Nekoosa Edwards Paper Co. v. Ind. Comm., 154 Wis. 105,
Hahneman Hosp. v. Ind. Comm., 282 Ill. 316, 118 N. E. 767.

In *Griffith & Sprague v. Marshall, supra,* decided under the Longshoreman & Harbor Worker's Act, the Deputy Commissioner found that the decedent was intoxicated at the time of receiving his injury but that nevertheless the dependents were entitled to compensation because the intoxication was not the sole cause of the death. In this case the Deputy Commissioner did not find that there was any intoxication at all, or even suggest it as he did in regard to homicide.

In Illinois the compensation act has a provision similar to that in the District of Columbia, requiring the injury to arise out of and in the course of the em-

ployment. In the case of *Hahneman Hospital v. Ind. Comm.*, 282 Ill. 316, 118 N. E. 767, a hospital employee, whose duties included overseeing of several jobs was found at the bottom of a flight of stairs with injuries which resulted in his death. It was contended that the death was not due to an accident but to intoxication. Ten minutes before the accident he receipted for coal bills. The court said:

> "The finding that he was not so intoxicated as to take him out of the course of his employment and that the injury causing his death did not result directly from his intoxicated condition must be sustained. If he had been in such a state of intoxication as to totally incapacitate him from performance of his work the injury and death might properly be said to arise out of his condition rather than his employment. Before drunkenness can be said to bar a recovery under the workmen's compensation act the employee must be so intoxicated, *as shown by the evidence,* that the court can say, as matter of law, that the injury arose out of his drunken condition, and not out of his employment. * * * Our statute was not designed to make contributory negligence of the employee, or a defense of that nature, a bar to his recovery under the workmen's compensation act, where, as in this case, his injury arose out of and in the course of his employment." (Italics are ours.)

In the four cases above cited there was a finding of intoxication, yet compensation was awarded. The purport of all these cases is that intoxication prevents compensation only when it is the sole and exclusive cause of death. As far as the fact is concerned it is covered by the finding of the Deputy Commissioner.

C. A Policy of Insurance Cannot be Cancelled Unless There is a Proper Notice of Cancellation Furnished to the Commissioner and to the Employer in Strict Compliance With the Act.

The appellee, Royal Indemnity Company, was the insurance carrier at the time of the death and the insurance policy No. C-598146, covering the employees of appellee, B. Earlie Talbott, was still in force at that time. The Deputy Commissioner was in error as a matter of law in holding that there was a proper notice of cancellation of said policy in accordance with the Compensation Act.

Appellee insurance carrier relies on a letter of cancellation, which contained a wrong number (C-569146) as the number of the policy actually covering the employees of Talbott. (R. 17, 18.) Records of the commission show coverage by the Royal Indemnity Company from July 1, 1932, to June 30, 1933, under policy No. C-598146, the correct number. (R. 23.) There is also the admission of Talbott, appellee, by his attorney, that he did not pay the premium after July, 1932. (R. 20.) There is also the statement of counsel for the appellee, Indemnity Company, not under oath, that the number C-569146 in the notice of cancellation was an error and should have been C-598146. (R. 17, 18.) The Deputy Commissioner made the statement that if the appellee Indemnity Company proved it was a typographical error he would hold the notice valid. (R. 23, 24.) Then without such proof he determined that it was an error and held the cancellation notice valid and at the threshold of the case excused the appellee Indemnity Company from participation in the case, relieving them of liability as insurance carrier in the

case, from all of which appellant noted an exception. (R. 26.) No policy other than C-598146 covered this risk. (R. 24.) The only notice that the employer received was that the "policy *would be* cancelled if the premium was not paid by a certain time." (R. 21.) (Italics ours.) The employer admitted, however, that there was no coverage in November, the time of the death. (R. 26.)

The Deputy Commissioner cannot base his finding on matters not in the record. To do so is error of law. *Crowell v. Benson,* 285 U. S. 22, 46; 76 L. ed. 599. In finding that there was a typographical error, the Deputy Commissioner did so without having evidence of it, except the aforesaid statement of counsel of the Indemnity Company, not under oath and based on hearsay. Furthermore, there is no evidence that there was a notice of cancellation sent to the employer.

A typographical error is not sufficient to excuse the appellee Indemnity Company from furnishing a proper notice of cancellation to the Commission, as it, the agency to protect the employee, cannot do its duty unless it gets a cancellation notice, accurate at least as to the policy number. Section 39 of the Compensation Act provides that the Commission shall administer the Act. Section 35 provides that when the employer is not a self-insurer the Commission shall provide for the discharge, by the carrier for the employer, of such obligation and duties of the employer in respect of his liability for compensation. Section 32 provides that "every employer shall secure the payment of compensation under this Act, either by insuring or keeping insured the payment of such compensation by qualifying as a self-insurer." The Deputy Commissioner did

nothing to compel Talbott to get new insurance, relying upon the records of the Commission which showed that Talbott was insured by Royal Indemnity Company, appellee, and no cancellation had occurred.

Whether or not there was a sufficient cancellation depends upon the meaning of Section 36 (b) of the *Compensation Act* which provides:

> "No * * * policy * * * shall be cancelled * * * until at least thirty days have elapsed after a notice of cancellation has been sent to the deputy commissioner and to the employer in accordance with the provisions of subdivision (c) of section 12."

Section 12 (c) of the *Compensation Act* provides:

> "Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business * * *."

The important question is whether a notice containing a wrong policy number is sufficient. The distinguishing feature of a policy is its number, which is the one thing making it different from any other policy. It must be correct in order to effect a cancellation of any particular policy. A strict interpretation of section 36(b) requires this and a strict interpretation of the Act is necessary in order to meet the principle that the Compensation Act should be construed liberally in favor of the employee. *Georgetown Hospital v. Stone,* 61 App. D. C. 200. While there are no cases strictly in point on the facts, yet the following compensation cases hold that an insurance policy can be cancelled

only by strict compliance with the policy or with the Act.

> *Hauter v. Cour d'Alene,* 39 Ida. 621,
> *Maryland Cas. Co. v. Johnson,* 134 Okla. 174,
> *Levan v. Pottstown Ry. Co.,* 279 Pa. 381, 382,
> *Grammo v. Greenpoint,* 204 N. Y. S. 419,
> *Skoczlois v. Vinocour,* 221 N. Y. 276, 116 N. E. 1004.

In *Hauter v. Cour d'Alene, supra,* the following language was used:

> "In view of the fact that such contracts are issued not only for the benefit of its employees, who necessarily have no control over the contract, we are of the opinion that such contracts should be cancelled only by a strict compliance with the conditions of the contract itself."

CONCLUSION.

The court below did not write an opinion and there is no way of knowing its reason for dismissing the bill of complaint in this case. It is respectfully submitted, however, that there was reversible error by the lower court in dismissing the bill, and the decree of the court should be reversed for the reasons:

(1) The death did arise in the course of and out of the employment inasmuch as there was a causal connection between the employment and the death because:

(a) the deceased was required to be on the place of employment by virtue of his contract at the time of his death by fire.
(b) claimant is entitled to the benefit of the presumption clause in section 20 of the Compensation Act.

(2) There was no evidence of intoxication or of homicide, or that intoxication in any way contributed to the death, so as to prevent an award of compensation.

Therefore the death was compensable and this case should be remanded to the Supreme Court of the District of Columbia with directions to said court to issue a decree directing the Deputy Commissioner, Robert J. Hoage, appellee, to make a finding in favor of appellant's claim and determine the amount of the award to her and her two children in accordance with law.

Respectfully submitted,

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COURT OF APPEALS
DISTRICT OF COLUMBIA
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JANUARY TERM, 1934.

No. 6157

JULIA B. SCOTT, APPELLANT,

vs.

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BRIEF ON BEHALF OF APPELLEES ROYAL INDEMNITY COMPANY AND B. EARLIE TALBOTT.

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BRIEF ON BEHALF OF APPELLEES ROYAL INDEMNITY COMPANY AND B. EARLIE TALBOTT.

Statement of Facts Applicable to Insurance Coverage.

The above mentioned cause arises out of an order of compensation denying benefits to Julia B. Scott and her two minor children, Anual David Scott and Pearl Beatrice Scott, the said Julia B. Scott being the surviving wife of William McKinley Scott, deceased, under the provisions of the Compensation Law in force in the District of Colum-

bia, namely the "Longshoremen's & Harbor Workers' Compensation Act of March 4, 1927 (U. S. C. A., Title 33, Ch. 18)", as made applicable to the District of Columbia by the Act of May 17, 1928 (D. C. Code, T. 19, Ch. 2), which Act will be referred to hereinafter as the Compensation Law.

On November 27, 1932, the decedent, William McKinley Scott, was employed by the appellee, B. Earlie Talbott, as resident janitor of an apartment house located at 70 Rhode Island Avenue, N. W. On that day, about four o'clock, A. M., a fire occurred in said apartment building. Two days thereafter, the charred body of said William McKinley Scott was found jammed in a dumb waiter shaft, life being extinct; that prior thereto and on, to wit, May 19, 1932, the appellee, Royal Indemnity Company, issued a policy of Compensation Insurance to take effect on July 1st, 1932 (R. 16). This policy of insurance covered B. Earlie Talbott in the operation of the apartment house located at 70 Rhode Island Avenue, N. W., as aforesaid, and known as the "Alzarado Apartments"; that on, to wit, July 22, 1932, the appellee, Royal Indemnity Company, filed with the U. S. Compensation Commission for the District of Columbia, a letter notifying the Commissioner of the cancellation of the Policy (R. 17), and at the same time notifying by letter, the employer, B. Earlie Talbott, of said cancellation (R. 21); that the original policy issued by said appellee contained the policy number C598-146 and the records of the commission showed that to be the correct number (R. 18); that inadvertently, however, a typographical error appeared on the letter of cancellation forwarded to the Commission, in that the Policy Number mentioned in said letter was quoted as "C569-146", instead of C598-146, as aforesaid, but the letter, however, specifically mentioned that the policy intended to be cancelled as of that date, was the policy issued May 19, 1932, to Benjamin E. Talbott who

was admitted to be the same party as B. Earlie Talbott (R. 18). This letter of cancellation was introduced into evidence by the Deputy Commissioner as shown from the record (page 25).

The records of the Commission further showed that *there was no other policy covering this risk except Policy No. C598-146* (R. 18). This letter of cancellation, sent by the appellee, Royal Indemnity Company, was never answered by the Commission and the Company was under the impression that the policy had been cancelled as of record with the Commission from July 22, 1932 (R. 18, 19, 20). The employer, appellee, B. Earlie Talbott, by and through his counsel, admitted at the hearing that he had no insurance coverage at the time of the accident on November 27, 1932 (R. 26), and the said employer further admitted by his attorney that he did not pay any premium after July, 1932 (R. 20). Record, pages 24 and 25, discloses that there was no other policy ever issued to this assured and that the policy No. C598-146 was a later issue than No. C569-146 so that the probability of the latter being issued after Policy No. C598-146 was very unlikely.

Record, page 23, shows that the Deputy Commissioner from the evidence, believed that a typographical error had occurred and that the cancellation clearly referred to the only policy in existence, No. C598-146, and that since due notice of cancellation had been given for a period of thirty days, in accordance with the Act, the cancellation was proper, as being effective on the 21st day of August, 1932 (R. 24). That before proceeding with the case on its merits, surrounding the death of the decedent, William McKinley Scott, the Deputy Commissioner, with regard to the insurance coverage made a finding of fact that there was no insurance coverage at the time of this accident and the appellee, Royal Indemnity Company, should therefore be dismissed as a party defendant to the hearing (R. 26).

On July 27, 1933, the Deputy Commissioner, by an award in writing, confirmed his ruling that there was no insurance coverage at the time of the accident and further rejected appellant's claim for compensation on the merits of the case. From this award, the appellant filed a Bill of Complaint in the Supreme Court of the District of Columbia under the provisions of the Compensation Law, to secure a Mandatory Injunction, which said Bill of Complaint, upon motions to dismiss filed by the appellees, was dismissed and it is from this ruling of the Supreme Court of the District of Columbia that this appeal is now being prosecuted.

ARGUMENT.

The finding of the deputy commissioner that there was no insurance coverage at the time of this accident is supported by sufficient and competent evidence in the transcript of record.

From the foregoing facts, it will be observed that we have presented for the consideration of this Court a situation where there was only one insurance policy in existence covering the employer, B. Earlie Talbott. This particular policy bore, as is usual and customary, a certain policy number. The policy was to take effect July 1, 1932 but no premium was at any time paid to the appellee, Royal Indemnity Company. Accordingly on July 22nd, due notice of cancellation was sent to the Commission as well as to the employer.

The notice of cancellation specifically mentioned the name of the employer but carried a reference to a wrong policy number instead of the correctly designated policy number of record. The employer, through his duly authorized counsel, admitted that he had no coverage at the time of this accident and that he understood that the policy had been cancelled and he had paid no premiums thereon.

The question, therefore, resolved itself purely into one of fact as to whether or not the mere fact that typographical error had very apparently occurred in mentioning the policy as C569-146 rather than C598-146, a proper notice of cancellation had been complied with under the terms of Sections 36(b) and 12(c) of the Act.

We respectfully submit that the position of the appellant in this case, with respect to the cancellation of this policy, is highly technical. The privity of contract existed between the Royal Indemnity Company and the employer, B. Earlie Talbott. At the time the policy was issued and the contract entered into, there was no thought on the part of any of the contracting parties that injury would subsequently occur to the decedent. He and the appellant are therefore total strangers to the contractual relations entered into between the employer and the insurance carrier, and we respectfully submit the appellant should not be permitted to raise a technical objection to the cancellation of this contract as between the parties in privity thereto, merely and solely upon the ground that an honest mistake of fact occurred in mentioning the policy number. The record fails to disclose, nor was it contended that there was any fraud or unfair dealings with respect to this particular contract of insurance on the part of any of the contracting parties involved, and it is earnestly urged that if any such contention as appellant advances is to be considered, the party to advance such contention should be the employer or assured, who was in privity with the insurance carrier, rather than a total stranger thereto, from whom no consideration passed in the execution of such contract. The record discloses, as aforesaid, that the employer, or assured, recognized the cancellation and accepted it as proper on the date the said policy was actually cancelled. Sections 36(b) and 12(c) specifically give to

the insurance carrier the right to cancel its policy. Section 36(b) simply prescribes that the notice necessary for cancellation shall extend at least thirty days before such cancellation shall be effective, while Section 12(c) simply provides the manner in which the notice shall be served, and the record discloses that this section was fully complied with and there has been no contention raised to the contrary, except the technical objection that the notice contained the wrong policy number.

We feel that this Court is fully acquainted with the general principle of law governing findings of fact with respect to compensation commissions, and we respectfully submit that the record amply discloses competent and substantial evidence to support the Deputy Commissioner's ruling, and under these circumstances the great weight of authority in the United States, interpreting Section 21 of the Compensation Act, Sub-section B, under which this suit is instituted, holds that the findings of fact made by Industrial or Compensation Commissions, on cases presented for decision, are final, and will not be disturbed by the courts upon appeal *where there is any evidence to support the findings.*

This Court has had occasion to decide the principle of law enunciated above in so many recent cases, including cases that counsel for the insurance carrier have personally presented for argument involving this particular kind of litigation, that we are well aware of the fact that the court is fully and thoroughly acquainted with the rule governing findings of fact of Compensation Commissions, and do not feel it necessary therefore to lengthen this brief by quotations from the decided cases in this and other jurisdiction.

Since, therefore, the transcript of record discloses sufficient competent and substantial evidence to support the findings of fact of the Deputy Commissioner, insofar as the insurance coverage is concerned, the appellee, Royal

Indemnity Company, respectfully submits that the ruling of the Supreme Court of the District of Columbia in dismissing the appellant's Bill of Complaint should be affirmed.

Argument on Behalf of Appellee, B. Earlie Talbott.

Court review is limited by the Act to a determination as to whether the Compensation Order is in accordance with law. If in accordance with law, the Commissioner's Findings are final. In *Crowell v. Benson,* 52 S. Ct. Rep. 285, the Court said:

> "The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficiency of the plan *depends upon the finality of the determinations of fact with respect to the circumstances,* nature, extent, and consequences of the employee's injuries and the amount of compensation that should be accorded."

And in *Powell v. Hoage,* 61 App. D. C., 99, the Court said:

> "We therefore reach the conclusion that the cases in *which we may set aside an order of the Commissioner as 'not in accordance with law' are only those in which it appears that there is an error of law, or in which the order of the Commissioner is not supported by substantial evidence,* as well, of course, in those in which it is arbitrary and unreasonable. If the finding, however, is supported by substantial evidence, it is final."

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> "Only in a case in which there is no evidence reasonably to support the findings, may we set aside the award of the Deputy Commissioner."

The ORDER in this case was a rejection of the claim, as follows:

> "Upon the foregoing findings of fact, the Deputy Commissioner orders that the claim for compensation be and the same hereby is REJECTED for the following reasons:
>
> 1. That the claimant failed to establish by evidence that the employee's injury and death on November 27, 1932, arose out of and occurred in the course of his employment.
>
> 2. That there is no evidence of any causal connection between the employment and the cause of death, and from the evidence, it appears that the said death may have been the result of homicide or other causes not connected with his employment."

The Act in section 21(b) provides for review of Compensation Orders. On page 10, of appellant's brief, there is a long criticism of the findings, based upon the form of statement and the punctuation of the findings; but since so much of the findings as the Deputy Commissioner considered essential are clearly re-stated in the Order shown above, we think further discussion of the findings unnecessary.

The only question for this Court is whether the statement in the Order—THAT THE CLAIMANT FAILED TO ESTABLISH BY EVIDENCE THAT THE EMPLOYEE'S INJURY AND DEATH ON NOVEMBER 27, 1932, AROSE OUT OF AND OCCURRED IN THE COURSE OF HIS EMPLOYMENT—has any evidence reasonably to support it.

> "* * * the burden of proof is upon claimant to prove by substantial evidence that the injury arose out of and in the course of the employment."
>
> Indemnity Co., *v.* Hoage, 61 App. D. C., 173.

Not only did the claimant fail in this requirement, but the contrary—that Scott's death neither arose out of or

in the course of his employment—is established by substantial evidence of the following facts:

THAT FOR SOME TIME PRIOR TO THE FIRE AND THEREAFTER UNTIL HIS DEATH, SCOTT DID NOT WORK FOR HIS EMPLOYER, AND WAS NOT SERVING HIS EMPLOYER IN ANY WAY, BUT WAS ACTING EXCLUSIVELY FOR HIMSELF.

IMMEDIATELY BEFORE HIS DEATH, SCOTT WAS ON HIS BED, DRUNK; HE EITHER SAT OR LAY ON HIS BED, PARTIALLY CLOTHED, APPARENTLY ENJOYING HIS OWN DRUNKEN PLEASURE, AND NOT DOING ANYTHING FOR HIS EMPLOYER.

SCOTT DIED WHILE DRUNK, IN A DUMB WAITER SHAFT, TO WHICH NO DUTY OWED TO HIS EMPLOYER CALLED HIM, AND WHERE HE COULD NOT HAVE PERFORMED ANY WORK OR SERVICE FOR HIS EMPLOYER.

ON THE DISCOVERY OF THE FIRE, SCOTT WAS INCAPABLE, THROUGH DRUNKENNESS, OF APPRECIATING AND USING AVAILABLE MEANS OF ESCAPE. AND HE WENT OUT DIRECTLY INTO THE FIRE, WHICH WAS NOT A DANGER OF HIS EMPLOYMENT, BUT WAS A NEW AND ADDED PERIL TO WHICH, BY HIS OWN CONDUCT, HE NEEDLESSLY EXPOSED HIMSELF, AND THUS SEVERED ANY CONNECTION WITH HIS EMPLOYMENT.

On Saturday night, the night of the fire, Scott and his wife, Julia, went to her mother's on a visit, and returned to their quarters (in the apartment house where the fire was), about 11:30 p. m., when Julia went to bed. She never saw Scott after that. (R. p. 101-105). There is nothing in the record to show whether Scott remained on the premises thereafter, or went away from the premises, until about 2:30 a. m., Sunday morning, when Scott knocked on Nesbit's door, on the premises, and asked Nesbit to come and get a drink. Scott and Nesbit went to Dollar More Bill's house in Le Droit Court, and had drinks. (R. pp. 127, 128.) About 3:30 a. m., Scott left Dollar More Bill's, and there was testimony that he said he was going home.

It does not appear whether he did so or not. (Proof of declarations of intention as to the future have not strong probative value, Shepherd *v.* U. S., No. 50, Nov. 6, 1933, U. S. Supreme Court.) No one saw Scott alive after he left Dollar More Bill's. He may have stopped on the way back from Dollar More Bill's. Scott and Nesbit stopped for drink on the way up to Dollar More Bill's. "We came up and we went in the alley back there to see if we could get any whiskey in one alley and we couldn't get it, so we went to Dollar More Bill's." (R. p. 139). Scott tried to get Nesbit to pay for the drinks at Dollar More Bill's, but Nesbit said he had spent his money, and Scott loaned Nesbit the money for the drinks at Dollar More Bill's. (R. pp. 147, 148.) Possibly Scott tired of paying for Nesbit's drink, and he may have gone to another place where he would not have to share his drink money with Nesbit. At any rate, the record does not locate Scott until the discovery of the fire at about 4:30 a. m.

During the entire night preceding the fire, no definite period of time is shown by the record during which Scott remained on the premises. And outside of testimony as to what Scott said he was going to do, the record is devoid of proof of anything that Scott did for the employer, after Saturday morning. The employer then found Scott on the premises and Scott admitted having had a fight with Nesbit on Friday night.

If the record be searched for any evidence which might tend to meet the burden on claimant of proving that Scott's death arose out of his employment, we find only one possible circumstance which might be so considered, and that is that Scott was on the premises when he was killed. The effect of this circumstance will be considered hereafter.

Scott Was Drunk.

Dr. Murphy, claimant's witness who performed the autopsy, said:

> R. 36. "The stomach content showed alcohol 9.06 percent. His blood also showed a trace of alcohol. It is a foregone conclusion that any body subjected to an excessive amount of heat or rays of heat will cause a certain amount of oxidation of the body and thereby liberates the alcoholic contents. Therefore my conclusions would be in this case, that there was an excessive amount of alcohol both in the stomach and blood in order to find such an amount after death from exposure to heat.
>
> R. 38. * * * was drunkenness the primary cause of the death?"
>
> A. "Drunkenness was a contributory cause. The man had evidently been markedly under the influence of liquor in order to find as much alcohol in the stomach and blood as I found at the autopsy."
>
> Q. "Would it be your opinion, then, Doctor, that intoxication was the contributory cause?"
>
> A. "Yes, sir." "I maintain that the man was drunk."
>
> R. 39. "That means 9% of the contents of the stomach consisted of alcohol. A marked extreme amount after such a death."
>
> R. 40. "I have no way of estimating the actual amount (of alcohol) that was liberated other than we know there was a trace of alcohol still in the man's blood, and we know from experiments and tests that heat will burn up alcohol and therefore, in that length of time, with such burns as he had about his body, there must have been a large amount of alcohol liberated from his body."

The matter in appellant's brief under heading III B d, and the cases there cited in no way affect the opinion of Dr. Murphy that Scott was drunk when he died. The use of

the proof of drunkenness is to meet any inference from Scott's presence on the premises, at the time of the discovery of the fire, that he was engaged in his employment. And for this purpose, it is not necessary to show the precise degree of Scott's drunkenness or the exact extent of his incapacity therefrom. The interval of time involved is a matter of seconds, and the acts of Scott in this short time were (1) what he was doing immediately before discovery of the fire, and (2) what he did on discovering the fire. As to the first, Julia Scott said (R. p. 101-102) "* * * he got up off the bed and the springs, like when he got up, when he rose up they made a noise, when he got up off the bed * * * when he got to the door, he said 'Oh whee'." Scott, then had been on the bed. He was drunk. He was partially clothed. If the quantity of alcohol found by Dr. Murphy two days later is not accounted for by the drinks which Scott had at Dollar More Bill's, then Scott got more liquor somewhere. For Dr. Murphy's findings at the autopsy stand without question. It is inferable from his course in going to Dollar More Bill's that Scott stopped and got more liquor on the way back, before he got on the bed. Scott had been away from his quarters for an undetermined time that night and probably lacked sleep. Scott's condition could have been none other than one of drunken sloth. All that the record shows as to his capacity is that he made an exclamation, and that he could walk.

The effect of his drunkenness on what he did on discovering the fire, appears very clearly. Instead of saving himself, as did Julia, Scott went out into the fire. The course he must have taken is indicated on the plat at Record page 70, by a line from "living room," near the upper left hand corner, through the mass of check marks, indicating fire, and around towards the left side, in the direction of "dumb waiter, body here." This line is flanked by arrow tip marks indicating direction. Scott was found

dead in the dumb waiter shaft. Means of escape were at hand, but Scott's condition of drunkenness, overcame the instinct of self preservation. He crazily, needlessly, not only exposed himself to the danger which caused his death, but apparently forced himself senselessly into the dumb waiter shaft, from which he was apparently not able to get out.

This was directly opposed to the natural instincts of a normal person, and was an absolute turning aside from his employment. Scott's conduct at this time severed any connection with the service of his employer. The apparent effect of the condition of drunkenness into which Scott voluntarily put himself, was to cause him to fail to remember and appreciate the means of escape from the vicinity of his quarters. These were, first, the windows in his quarters through one of which Julia and her children left the building; second, the basement door, opening on to T Street, which was just outside of his quarters. (R., plan, page 70.) And third, the windows on the T Street wall. Scott must have used the basement door opening out to T Street, at least four times earlier that night. It may be that Scott's drunken condition caused him not to realize the danger from the fire. Certainly, Julia had this realization and acted quickly upon it. But it could have been nothing but his drunken, crazed condition which caused Scott to turn away from the means of escape between him and the fire, and to go beyond into the part of the basement where the fire was greatest. (R., plan, p. 70.)

Drunkenness is not the only fact relied upon by the employer to show lack of connection between the death and the employment. But the appellee, employer shows here, as well, that there was no act of Scott in his employer's service, and further shows that Scott's presence on the premises cannot be used as a connection with the employment, because Scott turned aside from safety, and by his

own act went to his destruction. The cases cited in appellant's brief, III B e, do not involve such a situation. In Griffith & Sprague *v.* Marshall, 56 Fed. (2d) 665, the court said: "* * * such an accident might well befall one in full possession of his faculties."

In the Neekoosa case, 154 Wisconsin 105, the question was whether the accident was caused by "willful misconduct", and we find no provision in the Wisconsin statute in respect of intoxication.

Under certain Workingmen's Compensation Acts, including the Maryland Act and the District of Columbia Act, there is imposed upon the employer an obligation to pay compensation in respect of injuries arising out of and in the course of the employment, and from this obligation to pay, there is an express exception where (if) injury results solely from the employee's intoxication. This exception is sometimes spoken of as a "defense" to the claim. It is in fact an exception to a liability and the burden of proof is upon the employer to show the intoxication. But this must be distinguished from the case in which intoxication is relied on as showing the injury to be outside of the scope of the phrase "arising out of and in the course of the employment." Proof of this connection between injury and employment must be made to bring the claim within the Act, and the burden of proof is upon the employee, to show that notwithstanding the intoxication, the injury still arises out of and in the course of the employment. In American Ice Co. *v.* Fitzhugh (appellant's brief, p. 21), the court says on page 393:

> "Where, therefore, the intoxication is relied on as a *defense,* it must appear that the injury * * * was caused solely and exclusively by the intoxication * * *."

But the court does not say that under the Maryland Act, proof of drunkenness may not have the effect of showing

the injury not to have arisen out of and in the course of the employment.

The language of the court in Hahnemann Hospital *v.* Ind. Com. (appellant's brief, p. 21), is to the contrary, but this is due to the peculiar provisions of the Illinois statute. The facts in the Hahnemann case, however, are quite dissimilar from those in the Scott case. In the Hahnemann case, the employee receipted for two loads of coal in the line of his duty less than ten minutes before his injury. In the Scott case nothing connects Scott with his employment, except the circumstance of his having been on the premises.

Scott's presence on the premises at the time of the fire is not evidence from which to claim that his death arose out of and in the course of his employment.

The claimant's burden of establishing that Scott's death arose out of the employment is not met by the circumstance that Scott was on the premises at the time of his death. The appellant's theory that Scott was required to remain on duty at the apartment house all the time is broken by Julia Scott's own testimony that in the Summer time Scott worked out at other places. (R., p. 107.) And by the testimony of the employer that he did not allow Scott on the premises when Scott was intoxicated and that Julia Scott kept Scott "out of sight, out of his duties" when Scott was intoxicated. (R., p. 171.) And as an actual matter of fact, during the last night of his life, Scott is not shown by the record to have been on the premises for any definite period. That Scott's presence on the premises when the fire was discovered did not cause his death is clearly shown by the fact that Julia Scott, from the same starting place, and burdened by a young child and a baby, left the premises unharmed.

The cases cited in appellant's brief under the heading III B a are not in point. The Giliotti case and Rucker *v.*

Rand involve employees who were trapped—caught without chance of escape. Scott was not trapped; he was drunk and had made himself incapable of looking out for himself. He needlessly and without any possible chance of serving his master, exposed himself to danger. Julia Scott put herself and child and baby out the window of her quarters; Scott did not use this window. Scott passed by and went away from the exit door from the basement to the street (R., pp. 70-162); and went into a basement where there were twenty-nine windows. (R., p. 161.) And yet he was found dead in the bottom of a dumb waiter shaft, where he could in no possible way have been of use or service to his employer, and where he had no substantial protection from the fire.

In the cases where presence on the premises is relied on to show that the injury occurred in the employment, a test question is:

"Was the employee enjoying a privilege or performing a service by remaining upon the premises?"

In *Kass* v. *Hirschberg,* 181 N. Y. S. 35, in respect of the death of a traveling salesman, the court said in part:

> "A hotel is in contemplation law a temporary home and it is difficult to understand how an employee of a manufacturing plant, going to his own home, and retiring for the night, can be said to have sustained an injury within the definition of the statute. * * * It is not a whit different than an accident of the same character which might have happened at the decedent's own home after his day's work was done. While the statute as amended * * * has enlarged the liability of employers it has not had the effect of insuring their employees generally against those accidents which are common to mankind; it is only as to accidents arising out of and in the course of the employment. * * * The accident here under consideration had no relation

to the employment, *the decedent was not doing anything for the employer at the time of the accident and there is no ground for this award.*"

In *Kraft* v. *West Hotel Co.* (Iowa), 31 A. L. R., 1245, 193 Iowa 1288, claimant, a chambermaid employed in hotel, was curling her hair with an alcohol lamp and burned herself. Court said in part (Judge De Graff):

> "Unless it can be said that Lena Kraft was performing some service in some degree or some act required by her employer and to some extent contributing to his interests at the time in question, there can be no liability on his part for the injury sustained by her. Her occupation at the time of the injury was self serving. It was a mere incident that she was in the room at the time, and the injury received was not received as a natural incident of her work, or as was said in the Massachusetts case, 'a result of the exposure occasioned by the nature of the employment.' An accident cannot be said to arise out of the employment when it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself. The act in question was expressly forbidden by the master, and it was a matter that did not concern either him or his business. * * *."

In *Roebling Co.* v. *Indus. Com.*, 171 Pacific 987 (California), the Court said in part:

> "If we are to assume another state of facts, to-wit, that Bundshu on the night in question was intoxicated, that neglectful of his duty he went into the washroom with intent to sleep, that he there lighted the heater and tightly closed the door and windows and lay down upon the bench, and that under such conditions was killed, it must at once be said, we think, that the death was not such an accidental death as was a reasonably probable incident of the employment; and the last conclusion we feel is the one which the evidence, with little

uncertainty points to. But it is not essential to the case of petitioners that the conclusion last suggested be one which the evidence clearly established. The burden of proving, as has often been said in the decisions both of our own Supreme Court and courts of last resort in other states where similar conditions of statute exist, that the injury for which compensation is asked was suffered in the employment and arose out of the employment, is upon the claimant. Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment and others that the misconduct of the person injured was the producing cause, then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests. A finding in such a case in favor of the claimant is said to be speculative. * * * Sanderson's Case, 224 Mass. 558, found in 113 N. E. 355, was a case where the Industrial Commission of that state awarded compensation to a widow where death had apparently been caused by accidental means. The court, in the course of its opinion, declared that many conjectures could be made as to the cause of the fall of the deceased, some of which would sustain the application and others negative any right in the claimant. It concluded that the finding of the commission was based 'upon surmise, speculation, and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence'; the court adding:

"'It may be the dependent is correct in her contention that the death of the employee was due to a fall from the wagon, but other theories and conjectures are quite as probable.'

"And we may remark that the uncontradicted evidence in this case indicates, if we are to choose between conflicting speculative deductions, that on the night in question the deceased willfully stepped aside from the performance of the duties which his employment laid upon him and invited by direct action on his part the

> occurrence of the detrimental causes which produced his death. In our opinion, the conclusion of the commission is not supported by sufficient evidence."

Consider the test "was the employee enjoying a privilege, or performing a required service by remaining upon the premises?"

Julia Scott testified (R. p. 107) that the employer furnished quarters.

Sec. 2 (13) of the Act provides in part:

> " 'Wages' means the money rate at which the service rendered is recompensed under the contract * * * including the reasonable value of * * * rent, housing, lodging, or similar advantage received from the employer * * *."

Therefore, the furnishing of quarters to Scott by the employer Talbott, was a part of Scott's wages.

Take the case of two janitors of similar apartments. Janitor A gets $40.00 a month but is furnished no quarters on the premises; Janitor B gets $30.00 a month and is furnished quarters on the premises. Janitor A when he spends for groceries or amusements, the $10.00 which he gets in excess of what B gets, is using and enjoying part of his wages and that involves no service whatever to his employer. And so when B uses his quarters for his own comfort or pleasure, he is enjoying a part of his wages and not performing any work or service for his employer. If when B uses his quarters for his own pleasure, he is rendering service to his employer, then so is A when he spends the $10.00. But A's use of his $10.00 is plainly no service to his employer, therefore no more is B's use of his quarters for his own pleasure. And particularly is this so, if B (in this case Scott), should use his quarters for the enjoyment of a condition of drunkenness, a condition in which he is not

allowed on the premises, a condition not only not connected with his employment, but fundamentally inconsistent with the performance of the duties of his employment.

No case cited by claimant to show that Scott's presence on premises brought the injury within the employment, involved drunkenness, as does this Scott case. The element of drunkenness differentiates this Scott case and gives added support to the Commissioner's Order.

With respect to the discussion contained in the appellant's brief, page 10, regarding the expression by the Deputy Commissioner in his award, that Scott's death may have been the result of homicide, in passing, we simply desire to say that this expression in the award apparently is purely dicta, tending merely to show the doubtful nature of the testimony in support of the claimant's contention, and is, we respectfully submit, of such character as to require no further comment with respect thereto.

There is not competent evidence to show that Scott was in the course of his employment at the time of his death. Scott's living in the apartment house was part of his compensation and was given to him for use, just as if he had had an apartment elsewhere. There was no testimony in the record to show that Scott was doing anything in the interest of his employer; statements are alleged to have been made by Scott at 3.30 a. m. that he was going home but the fire was at 4.30 a. m. and there is no testimony to connect Scott with his employment at 4.30. The mere fact that Scott ran into the fire does not indicate any connection with his employment. This would be mere conjecture and conjecture is not sufficient to support a finding; there must be testimony of connection with the employment.

To save time, we pass some inaccuracies in the statement of facts in Appellant's Brief; but consider that we should

note the following references, for which we fail to find support in the record.

Page 3, line 9—"on duty twenty-four hours a day."

Page 3, line 12—"The claimant saw deceased sober at 11.30 p. m. * * * " We find no more than—"He had not been drinking before I went to bed."

Page 4, line 23—" * * * all the competent evidence established that deceased was not drunk at the time of his death."

Dr. Murphy's testimony as to the alcoholic content of Scott's stomach, at the autopsy, is the only positive testimony which necessarily related to the *time of* Scott's death. Dr. Murphy's opinion was that Scott was drunk when he died. Scott's death could not have been long after 4.30 a. m. Julia Scott last saw Scott about 11.30 p. m. Nesbit and Dollar More Bill last saw Scott about 3.30 a. m. Scott may well have drunk more alcohol after Nesbit and Dollar More Bill saw him. Dr. Murphy, a qualified expert, measured and recorded the alcohol in Scott's stomach at the autopsy. If witnesses did not see Scott take as much alcohol as Dr. Murphy found, then Scott drank it out of the presence of these witnesses. For the alcohol was in Scott's body and nothing in the record in any way questions this fact.

Dollar More Bill's statement in page 153 of the record as to Scott's not having been drunk was stricken out.

Statements as to when Scott returned to his quarters from Dollar More Bill's (Appellant's Brief, page 8) are pure speculation.

The statement on page 11 of the Brief that Scott was "on the premises of his employment, either sleeping, resting or working * * *" is completely met by evidence that Scott failed to take available means of escape and went directly into the fire without possibility of fulfilling any demand of his employment.

On page 20 of the Brief, lines 3 and 4, as to Scott's not being drunk at Dollar More Bill's, so much of this matter as is referable to Rec. p. 153 was stricken out on motion.

Conclusion.

Claimant, appellant, had the burden of establishing that Scott's death arose out of and in the course of his employment, and to make this showing Appellant relied upon the fact that Scott was on the premises when he died. The appellee, employer, established that Scott was drunk and that far from having died while asleep, or resting or working, on the premises, Scott failed to take available means of escape, and directly by his own conduct, for no purpose of his employment, brought on his own destruction.

These facts leave no room for any presumption under Section 20(a) of the Act, which is operative only in the absence of substantial evidence, and these facts further fully support the Order of the Deputy Commissioner.

Accordingly, we respectfully submit that the decree dismissing the bill of complaint should be affirmed.

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